

TEXAS COURT OF CRIMINAL APPEALS

No. PD-0563-19

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Casey Allen Martin, Appellant,
v.
State of Texas, Appellee

On Discretionary Review from the Second Court of Appeals
No. 02-18-00333-CR

On Appeal from Criminal District Court No. 1, Tarrant County
No. 1515753D

Appellant's Brief

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To the Honorable Judges of the Texas Court of Criminal Appeals:

Appellant respectfully submits this Brief:

V. Statement of the Case, Procedural History, and Statement of Jurisdiction

Appellant requests that this Court review the Opinion of the Court of Appeals in [*Martin v. State*, 576 S.W.3d 818 \(Tex.App.-Fort Worth 2019\)](#). *See* Appendix. The Second Court of Appeals affirmed the Order of Deferred Adjudication (“Judgment”) entered on June 18, 2018 (CR.35-37),¹ in which Appellant was placed on deferred adjudication community supervision for seven years for Possession of a Controlled Substance (methamphetamine) one gram or more but less than four grams under [Tex. Health & Safety Code § 481.115\(c\) \(2017\)](#).

On August 13, 2012, Appellant was indicted for possession of a Controlled Substance (methamphetamine) one gram or more but less than four grams under [Tex. Health & Safety Code § 481.115\(c\) \(2017\)](#): the grand jury alleged that on or about August 31, 2017, in Tarrant County, Texas, Appellant intentionally or knowingly possessed the

¹The Clerk’s Record is cited as “CR” followed by the page number. The Reporter’s Record is cited as “RR” followed by the page or exhibit number.

controlled substance methamphetamine in an amount one gram or more but less than four grams, including adulterants or dilutants. (CR.5).

Appellant filed a motion to suppress evidence seized from his home. (CR.13-15). After a hearing, the trial court denied the motion and signed Findings of Fact and Conclusions of Law (“FFCL”). (CR.16-20). Appellant pleaded guilty in exchange for deferred adjudication community supervision (Judgment) but reserved the right to appeal the ruling on the motion to suppress. (CR.24).

Appellant appealed the Judgment and FFCL. On May 16, 2019, the Court of Appeals affirmed. [*Martin*, 576 S.W.3d 818](#).

On July 17, 2019, Appellant filed a timely PDR. On October 9, 2019, this Court granted the PDR on the sole issue asserted. Thus, this Court has jurisdiction over this case.

VI. Statement Regarding Oral Argument

Oral argument has been granted. *See* [Tex. Rule App. Proc. 68.4\(c\)](#)
[\(2019\)](#).

VII. Grounds for Review

Ground 1: In [*Talent v. City of Abilene*, 508 S.W.2d 592 \(Tex. 1974\)](#), peace officers were distinguished from firefighters, who “(have) no roving commission to detect crime or to enforce the criminal law.” Unlike fire marshals, who are peace officers, firefighters do **not** have general law-enforcement powers. Thus, absent an exigency that allows an officer to enter without a warrant, if a firefighter enters a home to extinguish fires or save lives and notices contraband even in plain view, that firefighter’s knowledge does **not** “impute” to a peace officer, and the officer should be prohibited from entering the home without a warrant.

VIII. Facts

On August 30, 2017, at approximately 10:49 p.m., the Bedford Fire Department (“BFD”) was called to a fire due to a water-flow alarm at an apartment complex. (RR2.6-8); Firefighter Cook located the source of the fire as an apartment on the second floor, with smoke and water flowing from the door. (RR2.8). Cook saw the tenant, Appellant, sitting on the sidewalk leading up to his apartment, who told Cook that he fell asleep while cooking on the stove. (RR2.21). Appellant told Cook that nobody else was inside the apartment. (RR2.21). BFD entered the apartment, and finding nobody inside, extinguished a small fire on the cooktop within two minutes. (RR2.22-23). To ventilate the apartment Cook attempted to open a window in the back bedroom, kneeling on a futon to reach the window, and his knee touched a firearm. *Id.* Cook saw a revolver on the bar. (RR2.9). The firefighters observed other firearms and ammunition scattered throughout the apartment, giving Cook additional safety concerns. (RR2.15-24).

In plain view, Cook saw “drug paraphernalia” on dressers, tables, and a shelf in an open closet. (RR2.17-22). The “drug paraphernalia” Cook saw consisted of empty baggies and pills that Cook could **not** identify—or even tell whether they were Tylenol or Xanax. (RR2.28-29; RR3.SX-

11, SX-13). In fact, Cook could **not** verify that any substance he saw was illegal. (RR2.29). And, the pills he saw were Ibuprofen for which Appellant had a prescription. (RR2.57). Cook knew only that what he saw was near flammable liquids and firearms. (RR2.24, 29). Cook did **not** see any illegal drugs in the apartment. (RR2.29). Cook had no training with firearms, and therefore the police were called. (RR2.16, 52). Cook called the police due to “safety concerns” and the “drug paraphernalia.” Cook became concerned about his safety and the safety of other firefighters. (RR2.24).

At about 11:36 p.m., Officer Hart was dispatched to “assist the fire department on the structure fire...” (RR2.32-33). Cook would **not** have allowed officers into the apartment until the apartment was given the “all-clear.” (RR2.23). When Hart arrived, the room where the fire occurred (kitchen) was completely ventilated. (RR2.23-24).

Hart contacted the BFD battalion chief, who told Hart that BFD could not ventilate the back bedroom of the apartment because there were blankets over the windows and BFD located guns and drug paraphernalia inside the apartment. (RR2.34). The chief told Hart that

he was concerned about the safety of BFD due to what they had observed and wanted Hart to “secure” the apartment. (RR2.34).

Admitting that he did **not** have a warrant, Hart entered the apartment stating that he wanted to conduct a “protective sweep” to “make sure there isn’t any other threats” inside the apartment. (RR2.35-36, 47-48). Hart first claimed to be looking for “people, bodies.” (RR2.36). He also initially claimed that he “didn’t know that there was going to be anyone inside” the apartment. (RR2.42). But under cross-examination, Hart claimed that the firefighters told him that they were “concerned for their safety” and were “unable to complete their duty unless (Hart) went inside and made sure everything was safe.” (RR2.48).

In fact, the firefighters **never** told Hart that there was anybody inside the apartment but only that they were concerned about the “numerous firearms.” (RR2.50). In Hart’s words, “I didn’t have any specific information that led me to believe that” (there was anyone inside the apartment). (RR2.50). Further, Hart never obtained or attempted to obtain Appellant’s consent to enter the apartment without a warrant. (RR2.50). In fact, Hart knew that Officer Noble had asked Appellant for consent to search and that Appellant refused. (RR2.56).

Hart knew that possessing a firearm by itself inside a home is legal and Hart had no information that the firearms were stolen or that Appellant was a felon or otherwise prohibited from possessing a firearm. (RR2.51-52).

Hart called it an “exigent circumstance” because the firefighters were not going to be able to finish “ventilating the residence.” (RR2.48-49). But he admitted that Appellant was not doing anything that was impeding the investigation or destroying evidence. (RR2.49).

Hart saw a firearm laying on the bar in the kitchen, a firearm on the couch in the living room, and firearms in the bedroom. (RR2.36). In the back bedroom, Hart also saw “drug paraphernalia” in plain view: in an open closet, Hart saw “water bongs” or “some type of bongs that were used to smoke marijuana” containing residue, empty plastic baggie, and one baggie that contained a “white crystal-like substance.” (RR2.34-38). Based on the presence of drug paraphernalia, Hart believed that an offense had been committed, and he “froze” the apartment as a crime scene. (RR2.58).

Hart exited the apartment two minutes after his initial entry claiming that that there was no one inside who could pose a safety risk.

(RR2.39; RR3.SX-17). However, although he had been dispatched because of the firearms, Hart never secured or cleared any of the firearms. (RR2.53).

Hart and other officers then reentered the apartment because he had “already observed all of the drug paraphernalia that was in plain view,” so Hart believed “that gives us basically the authority to freeze” the apartment if they wanted to. (RR2.42-43). However, Hart admitted on cross-examination that when a scene is “frozen,” law enforcement is supposed to not allow persons enter the scene until they obtained “lawful authority” to proceed with the investigation. (RR2.58). Based on what the officers saw, Appellant was arrested (by another officer) for a class C misdemeanor (drug paraphernalia) ticket. (RR2.44).

At **no** point is it shown in the 19-minute bodycam recording that Hart told BFD that it was “all clear”—that he secured the scene—and that BFD could reenter and continue ventilating. (RR2.53). BFD remained at the scene while Hart and other officers entered and exited the apartment to observe the contraband and firearms and to determine if they should obtain a search warrant. *Id.* Hart admitted that he should have waited for a search warrant before continuing the search of the

apartment. (RR2.44, 55). The officers were inside the apartment without a warrant and looking through things. (RR2.58-59).

The police did **not** obtain a search warrant until 3:12 a.m. on August 31, 2017. (RR2.62; RR3.SX-16), over three hours after the initial entry into the apartment by Hart. In the affidavit for the search warrant, an officer alleged that Cook and BFD had located what they believed to be drug paraphernalia inside the residence. [*Martin*, 576 S.W.3d at 822; *id.* at *4](#). Police executed the search warrant and found the methamphetamine—not in plain view—that is the subject of this case. (RR2.59).

In the FFCL, the trial court found that the firefighters' entry into the apartment was lawfully related to the exigent circumstance of combatting an ongoing fire, the firefighters would have been within their rights to seize the drug paraphernalia in plain view, Hart's entry was justified but that the TCCA had yet to address the issue, and firefighters could call officers to secure the scene of a fire and to observe in plain view, the same evidence that firefighters could seize. (CR.16-20); [*Martin*, 576 S.W.3d at 821; *id.* at *5](#).

IX. Summary of the Arguments

In [*Talent v. City of Abilene*, 508 S.W.2d 592 \(Tex. 1974\)](#), peace officers were distinguished from firefighters, who “(have) no roving commission to detect crime or to enforce the criminal law.” Fire marshals are peace officers. They have law enforcement powers. But firefighters are not fire marshals or law-enforcement officers in any capacity. Firefighters have **no** have general law-enforcement powers. Thus, absent an exigency that allows an officer to enter without a warrant, if a firefighter enters a home to extinguish fires or save lives and notices contraband even in plain view, that firefighter’s knowledge does **not** “impute” to a peace officer, and the officer should be prohibited from entering the home without a warrant.

Thus, the trial court erred and abused its discretion by denying Appellant’s motion to suppress. Appellant will ask this Court to reverse the Opinion and the Judgment, suppress all the evidence seized from Appellant’s apartment, and remand for a new trial.

X. Argument

1. **Ground 1:** In *Talent v. City of Abilene*, 508 S.W.2d 592 (Tex. 1974), peace officers were distinguished from firefighters, who “(have) no roving commission to detect crime or to enforce the criminal law.” Unlike fire marshals, who are peace officers, firefighters do not have general law-enforcement powers. Thus, absent an exigency that allows an officer to enter without a warrant, if a firefighter enters a home to extinguish fires or save lives and notices contraband even in plain view, that firefighter’s knowledge does not “impute” to a peace officer, and the officer should be prohibited from entering the home without a warrant.

Introduction

As stated in the PDR and as acknowledged by the trial court and noted by the Court of Appeals, this is an issue of first impression in Texas. [*Martin*, 576 S.W.3d at 822](#). Firefighters are **not** “peace officers.” They have **no** roving commission to detect crime or enforce criminal law. What firefighters learn in entering a home after a fire-related emergency—to extinguish fires and save lives—**cannot** impute to a peace officer such that the officer may use that information to make a warrantless entry into a home when there are otherwise **no** exigent circumstances.

The evidence is clear that when Officer Hart arrived, he obtained all his information from the firefighters and especially from Cook. Hart claimed under oath that he entered to perform a “protective sweep” to look for “people, bodies” and that he “didn’t know that there was going to

be anyone inside” the apartment. (RR2.36, 42). However, this was **false**. The firefighters **never** told Hart that there was anybody inside the apartment but only that they were concerned about the “numerous firearms.” (RR2.50). Hart even admitted, “I didn’t have any specific information that led me to believe that” (there was anyone inside the apartment). (RR2.50).

This case is also about two other issues inextricably intertwined with the Ground for Review: first, Appellant asks this Court to continue protecting the requirement of the search warrant. The brief language of the Fourth Amendment is about the requirement of the search warrant:

“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”

[U.S. Const. Amend. IV](#). The requirement of the search warrant is **not** a “suggestion.” It is a **mandate**.

Second, this case what the Fourth Amendment was designed for: to deter future Fourth Amendment violations because of misconduct by law enforcement. [*Davis v. United States*, 564 U.S. 229, 235-237 \(2011\)](#) (The Court restated the long-standing rule that the purpose of the

exclusionary rule is **not** to redress individual injury but to deter future violations of the Fourth Amendment). In fact, the exclusionary rule, **no** matter how it is applied and from what source—state or federal law—is used to deter future violations because of present misconduct by law enforcement. [*Vega v. State*, 84 S.W.3d 613, 619 \(Tex.Crim.App. 2002\)](#) (“When a law enforcement officer violates the laws of his or her own state, even while acting in good faith, exclusion of the evidence is appropriate because this remedy serves to deter future violations.”).

The misconduct by law enforcement here is clear: Hart claimed he entered Appellant’s apartment under the guise of a “protective sweep” to “make sure there isn’t any other threats” inside the apartment” when he knew that there was **nobody** inside the apartment and the reason he was called was because the firefighters were “alarmed” by the presence of firearms (completely legal in Texas) and the **absence** of illegal drugs. (*See* RR2.29, Cook did **not** see any illegal drugs in the apartment). Cook had **no** training with firearms, which is why the police were called. (RR2.16, 52). And although Hart was supposed to “clear” the scene so BFD could reenter and continue ventilating, at no point during the 19-minute bodycam recording does it show that Hart told BFD that it was

“all clear”—that he secured the scene—and that BFD could reenter and continue ventilating. (RR2.53). Instead, Hart and other officers continued to enter and exit the apartment—without a warrant.

Standard of review for rulings on motions to suppress

An appellate court considers a trial court’s ruling on a motion to suppress under an abuse-of-discretion standard and a bifurcated standard of review: almost total deference is given to trial court’s determination of historical facts, especially if those determinations turn on witness credibility or demeanor, and de novo review of the trial court’s application of the law to facts **not** based on an evaluation of credibility and demeanor. [*Neal v. State*, 256 S.W.3d 264, 281 \(Tex.Crim.App. 2008\)](#); [*Hubert v. State*, 312 S.W.3d 554, 559 \(Tex.Crim.App. 2010\)](#); [*Carmouche v. State*, 10 S.W.3d 323, 327 \(Tex.Crim.App. 2000\)](#); *see also* [*Abney v. State*, 394 S.W.3d 542, 547 \(Tex.Crim.App. 2013\)](#) (When considering a trial court’s application of the law to facts that do not turn on credibility and demeanor, review is de novo).

If the trial court’s findings of fact and conclusions of law are supported by the record—they are **not** in this case—an appellate court is “not at liberty to disturb them, and on appellate review, (the

appellate court) addresses only the question of whether the trial court improperly applied the law to the facts.” [*Romero v. State*, 800 S.W.2d 539, 543 \(Tex.Crim.App. 1990\)](#). As the following will show, the trial court erred and abused its discretion by denying Appellant’s motion to suppress.

There was no exigency inside the apartment justifying a warrantless search. The Court of Appeals ignored critical facts and erred by finding that there was an exigency after the firefighters exited the apartment to inform law enforcement that they saw firearms or “contraband” in plain view

The factual findings by the Court of Appeals ignored critical facts that show that there was **no** exigency and Hart’s entry into the apartment for a “protective sweep” was a ruse. The Court of Appeals found that on August 30, 2017, at approximately 10:47 p.m., the Bedford Fire Department (“BFD”) was called to a fire at an apartment complex. [*Martin*, 576 S.W.3d at 821; *id.* at *2](#). Firefighter Cook located the source of the fire as an apartment on the second floor, with smoke and water flowing from the door. *Id.* Cook contacted the tenant, Appellant, who said he fell asleep while cooking on the stove. *Id.* BFD entered the apartment and extinguished a small fire on the cooktop. *Id.* To ventilate the

apartment Cook attempted to open a window in the back bedroom, kneeling on a futon to reach the window, and his knee touched a firearm. *Id.* Cook became concerned about his safety and the safety of other firefighters. [Martin, 576 S.W.3d at 821; id. at *3.](#) The firefighters observed other firearms and ammunition scattered throughout the apartment, giving Cook additional safety concerns. *Id.*

In plain view, Cook saw drug paraphernalia on dressers, tables, and a shelf in an open closet. *Id.* Cook called the police due to his safety concerns and the drug paraphernalia. *Id.*

Officer Hart was dispatched. *Id.* When Hart arrived, he contacted the BFD battalion chief, who told Hart that BFD could not ventilate the back bedroom of the apartment because there were blankets over the windows and BFD located guns and drug paraphernalia inside the apartment. *Id.* The chief told Hart that he was concerned about the safety of BFD due to what they had observed, and he wanted Hart to secure the apartment. *Id.*

Without a warrant, Hart entered the apartment and inspected each room, ending with the back bedroom, where he saw drug paraphernalia in plain view: a pipe or bong containing drug residue, a plastic baggies

containing drug residue. *Id.* Based on the presence of drug paraphernalia, Hart believed that an offense had been committed, and he “froze” the apartment as a crime scene. *Id.*

Hart exited the apartment two minutes after his initial entry and determined that there was no one inside who could pose a safety risk. [*Martin*, 576 S.W.3d at 821-822; id. at *3-4.](#) BFD remained at the scene while Hart entered and exited the apartment. *Id.* Additional officers went into the apartment to observe the contraband and to determine if they should obtain a search warrant. *Id.* Appellant, the sole resident, was arrested for possession of drug paraphernalia. *Id.*

The police did not obtain a search warrant until 3:12 a.m. on August 31, 2017. *Id.* In the affidavit for the warrant, an officer alleged that Cook and BFD had located what they believed to be drug paraphernalia inside the residence. *Id.* Police executed the search warrant and found the methamphetamine that is the subject of this case. *Id.*

In the FFCL, the trial court found that the firefighters’ entry into the apartment was lawfully related to the exigent circumstance of combatting an ongoing fire, the firefighters would have been within their rights to seize the drug paraphernalia in plain view, Hart’s entry was

justified but that the TCCA had yet to address the issue, and firefighters could call officers to secure the scene of a fire and to observe in plain view, the same evidence that firefighters could seize. [Martin, 576 S.W.3d at 822; id. at *5.](#)

The Court of Appeals left out critical facts on the issue of whether there was an exigency justifying the warrantless entry by Hart. First, circumstances allowing a warrantless entry are limited. Under [Payton v. New York, 445 U.S. 573, 590 \(1980\)](#), absent exigent circumstances, law enforcement may not enter a home without a warrant. Under [McNairy v. State, 835 S.W.2d 101, 107 \(Tex.Crim.App. 1991\)](#), exigent circumstances justify a warrantless intrusion to: (1) provide aid or assistance to persons officers reasonably believe need assistance; (2) protect officers from persons they reasonably believe to be present, armed, and dangerous; and (3) prevent the destruction of evidence or contraband. *See also* [Gutierrez v. State, 221 S.W.3d 680, 685 \(Tex.Crim.App. 2007\)](#) (same).

One such exigent circumstance is a protective sweep, which is a “quick and limited search of premises, incident to an arrest and conducted to protect the safety of police officers or others.” [Reasor v. State, 12 S.W.3d 813, 815 \(Tex.Crim.App. 2000\)](#). A protective sweep is

allowed in conjunction with an in-home arrest if the searching-officer possesses a reasonable belief based on specific and articulable facts that the area to be swept harbors an individual posing a danger to those on the arrest scene. *Id.* at 817. A protective sweep is **not** an automatic right police possess when making an in-home arrest. *Id.* at 816. Protective sweeps are permitted **only** when justified by a reasonable, articulable suspicion that the house is harboring a person posing a danger to those on the arrest scene. *Id.*; see [*Maryland v. Buie*, 494 U.S. 325, 337 \(1990\)](#) (the Fourth Amendment permits a limited protective sweep in conjunction with an in-home arrest when the officer possesses a reasonable belief based on specific and articulable facts that the area to be swept harbors an individual posing a danger to those on the arrest scene.).

A protective sweep is not a full search of the premises but involves “...only a cursory inspection of those spaces where a person might be hiding when there is a belief that there may be a person present posing a danger” *Buie*, 494 U.S. at 327; *Reasor*, 12 S.W.3d at 816-817. A protective sweep may last long enough only “...to dispel the reasonable suspicion of danger and no longer than officers are justified in remaining

in the home.” *Buie*, 494 U.S. at 335-336; *Reasor*, 12 S.W.3d at 816; *see also, e.g., United States v. Gould*, 364 F.3d 578, 587 (5th Cir. 2004) (provided that there is a reasonable, articulable suspicion that the area to be “swept” harbors an individual posing a danger to those on the scene, a protective sweep may extend to areas of a home where the police otherwise—apart from the protective sweep doctrine—have no right to go).

Thus, for the protective-sweep exception to the warrant-requirement to apply justifying a warrantless entry into a home, the officer’s belief that a protective sweep is necessary must be reasonable and based on knowledge that an individual posing a danger to those on the scene is inside the home.

In Appellant’s case, there was **no** such reasonable belief for the warrantless entry. In fact, the premise for the warrantless entry was **false**. When Hart was dispatched at about 11:36 p.m. and arrived soon thereafter, Cook stated that he would **not** have allowed officers into the apartment until the apartment was given the “all-clear.” (RR2.23). In fact, when Hart arrived, the room where the fire occurred (kitchen) was completely ventilated. (RR2.23-24). Hart contacted the BFD battalion

chief, who told Hart that BFD could not ventilate the back bedroom of the apartment because there were blankets over the windows and BFD located guns and drug paraphernalia inside the apartment. (RR2.34). The chief told Hart that he was concerned about the safety of BFD due to what they had observed and wanted Hart to “secure” the apartment. (RR2.34).

Knowing that he did **not** have a warrant, Hart entered the apartment stating that he wanted to conduct a “protective sweep” to “make sure there isn’t any other threats” inside the apartment. (RR2.35-36, 47-48). However, Hart falsely claimed to be looking for “people, bodies” (RR2.36) and that he “didn’t know that there was going to be anyone inside” the apartment. (RR2.42). Hart also claimed that the firefighters told him that they were “concerned for their safety” and were “unable to complete their duty unless (Hart) went inside and made sure everything was safe.” (RR2.48).

However, the firefighters **never** told Hart that there was anybody inside the apartment but only that they were concerned about the “numerous firearms.” (RR2.50). In fact, Hart admitted that he “...didn’t have any specific information that led me to believe that” (there was

anyone inside the apartment). (RR2.50). **Nor** did Hart obtain or attempted to obtain Appellant's consent to enter the apartment without a warrant. (RR2.50). Hart knew that Officer Noble had asked Appellant for consent to search and that Appellant refused. (RR2.56).

Hart knew that possessing multiple firearms inside a home is legal. Hart had **no** information that the firearms were stolen or that Appellant was a felon or otherwise prohibited from possessing a firearm. (RR2.51-52). Hart called it an "exigent circumstance" because the firefighters were not going to be able to finish "ventilating the residence" due to the presence of firearms. (RR2.48-49). But Hart knew that Appellant was **not** doing anything that was impeding the investigation or destroying evidence. (RR2.49).

Although Hart saw a firearms, "water bong" or "some type of bong" that were used to smoke marijuana" containing residue, empty plastic baggie, and one baggie that contained a "white crystal-like substance" (RR2.34-38), there was **no** danger that any of the items were going to be destroyed or altered.

Yet after Hart exited the apartment after two minutes, realizing that there was **no** one inside who could pose a safety risk (RR2.39;

RR3.SX-17) and he knew he had been dispatched because of the firearms, Hart **never** secured or cleared any of the firearms. (RR2.53).

At this point, even if Hart's initial entry was justified as a "protective sweep" (it was **not**), Hart and other officers **reentered** the apartment because Hart had "already observed all of the drug paraphernalia that was in plain view," so Hart believed that this gave him "...basically the authority to freeze" the apartment if they wanted to. (RR2.42-43). This was also **false**. Hart knew that when a scene is "frozen," law enforcement is simply **not** supposed to allow persons enter the scene—presumably to maintain the integrity of the scene—until they obtained "lawful authority" to proceed with the investigation (RR2.58), i.e., obtained a search warrant. "Freezing" the scene is **not** a carte blanche for a warrantless search.

Further, at **no** point did Hart tell BFD that it was "all clear"—that he secured the scene—and that BFD could reenter and continue ventilating (RR2.53), which was purportedly the reason why Hart entered the apartment. Instead, Hart and other officers entered and exited the apartment and continued their warrantless search. (RR2.58-

59). Hart even admitted that he should have waited for a search warrant before continuing the search of the apartment. (RR2.44, 55).

Hart's entry and reentry into the apartment was not justified for a valid "protective sweep." It is absurd to conclude that the firefighters on the scene did **not** know that the apartment was clear of all persons. The firefighters would have told Hart if they believed otherwise. Thus, the purported exigency of "danger" was **false** and the "protective sweep" was **not** justified. Simply put, there is **no** evidence that by entering Appellant's home without a warrant that Hart or other officers were: (1) providing aid or assistance to persons whom law enforcement officers reasonably believe need assistance; (2) protecting officers and others from persons Hart or other officers reasonably believe to be present, armed, and dangerous; or (3) preventing the destruction of evidence or contraband.

The Court of Appeals noted that a warrantless police entry into fire-damaged property is presumptively unreasonable unless it falls within the scope of an exceptions to the warrant requirement. [*Martin*, 576 S.W.3d at 823](#), citing [*Turrubiate v. State*, 399 S.W.3d 147, 151 \(Tex.Crim.App. 2013\)](#) and [*Johnson v. State*, 226 S.W.3d 439, 443](#)

[\(Tex.Crim.App. 2007\)](#). The Court of Appeals also found that this general rule “applies equally to fire-damaged property ‘unless the fire is so devastating that no reasonable privacy interests remain in the ash and ruins.’” [Martin, 576 S.W.3d at 823](#). In Appellant’s case, this does **not** apply since “the fire was **not** so devastating that no reasonable privacy interests remain in the ash and ruins.” In fact, there is **no** indication that there was any damage other than some damage in the kitchen and smoke inside the apartment that was cleared.

The Court of Appeals also observed that exigent circumstances created by a fire are **not** extinguished the moment the fire is put out but continue for a reasonable time after the fire has been extinguished to allow fire officials to fulfill their duties including making sure the fire will **not** rekindle and investigating the cause of the fire. [Martin, 576 S.W.3d at 823](#), *citing* [Jones v. Commonwealth, 512 S.E.2d 165, 168 \(Va.Ct.App. 1999\)](#) and [Michigan v. Tyler, 436 U.S. 499, 510 \(1978\)](#). And, the determination of what constitutes a reasonable time to investigate varies according to the circumstances of a fire. [Martin, 576 S.W.3d at 823](#), *citing* [Tata v. State, 446 S.W.3d 456, 467 \(Tex.App.-Houston \[1st Dist.\] 2014, pet. ref.\)](#) and [Tyler, 436 U.S. at 510 fn.6](#).

Although these observations are correct, they are inapplicable in Appellant's case. There were **no** exigent circumstances that warranted two warrantless entries into the apartment. The "safety concerns" of the firefighters was due to the firearms and ammunition in the apartment. (RR2.15-24). There is **nothing** illegal about keeping firearms and ammunition in an apartment. A person is free to keep hundreds of firearms and thousands of rounds of ammunition in his home provided he is **not** otherwise prohibited from doing so, i.e., he is **not** convicted of a felony offense and it is less than five years of his release from prison, jail, supervision under community supervision, parole, or mandatory supervision, whichever date is later. *See* [Tex. Penal Code § 46.04\(a\)\(1\) \(2018\)](#) (Unlawful Possession of a Firearm). Law enforcement had **no** reasonable belief or knowledge that Appellant was prohibited from such possession. And, Firefighter Cook could **not** verify that any substance he saw was illegal. (RR2.29). The flammable liquids were **not** illegal. (RR2.24, 29). Cook did **not** see any illegal drugs in the apartment. (RR2.29).

Further, the fact that Cook had **no** training with firearms did **not** create exigent circumstances or "safety concerns." (RR2.16, 52). Firearms

do **not** discharge on their own. **Nor** do firearms move about on their own or blow up if touched. If Cook was so concerned about firearms, perhaps due to his clumsiness with them or because he has an unnatural fear of them, this does **not** create an exigency that justifies a warrantless intrusion into the apartment.

It is axiomatic that exigent circumstances created by the police or other public servant **cannot** justify a warrantless entry into a home. *See [Parker v. State](#), 206 S.W.3d 593, 598 fn.21 (Tex.Crim.App. 2006)* (“...exigent circumstances do not meet Fourth Amendment standards if the government deliberately creates them.”) (internal citations omitted); *see also, e.g., [United States v. Cantu](#), 230 F.3d 148, 153 fn.1 (5th Cir. 2000)* (“We note that exigent circumstances created by the police will not justify an unannounced entry into a home. The movement inside Cantu’s home could reasonably be attributed to the initial attempt to physically pry open the door to his mobile home. Such ‘manufactured exigent circumstances’ do not form an adequate basis for dispensing with the announcement requirement, especially when the initial attempt itself is unreasonable); *[United States v. Rico](#), 51 F.3d 495, 502 (5th Cir. 1995)* (Exigencies can be manufactured guilelessly or ulteriorly. Although

“there is no question that the deliberate creation of urgent circumstances is unacceptable...bad faith is not required to run afoul [of the Fourth Amendment].”); and [*United States v. Richard*, 994 F.2d 244, 248 \(5th Cir. 1993\)](#), *citing* [*United States v. Scheffer*, 463 F.2d 567, 574-575 \(5th Cir.\), cert. denied sub nom., *Stretcher v. United States*, 409 U.S. 984 \(1972\)](#), where cooperating defendants were sent by agents into a residence to consummate a drug deal and then then agents made a warrantless entry to arrest the residents. This was found to be a manufactured exigency since the agents controlled the timing of the drug-deal).

[*Rico*, 51 F.3d at 502](#) is especially persuasive in its finding that exigencies “can be manufactured guilelessly or ulteriorly,” and although “there is no question that the deliberate creation of urgent circumstances is unacceptable...bad faith is not required to run afoul [of the Fourth Amendment].”).

Hart’s actions were suspicious. Hart obtained all his information from the firefighters and especially from Cook. Hart claimed under oath that he entered to perform a “protective sweep” to look for “people, bodies” and that he “didn’t know that there was going to be anyone inside” the

apartment. (RR2.36, 42). However, the firefighters **never** told Hart that there was anybody inside the apartment but only that they were concerned about the “numerous firearms.” (RR2.50). Hart admitted, “I didn’t have any specific information that led me to believe that” (there was anyone inside the apartment). (RR2.50). This appears to be a falsification of the reason for the warrantless entry. But regardless of whether Hart and the other officers had bad intent and bath faith or were just sloppy in their police work, [*Rico*, 51 F.3d at 502](#) persuasively tells us that the motive or intent does **not** matter. What matters is that the exigency in Appellant’s case was **not** real and the protective sweep was invalid and **not** justified. Hart’s warrantless entry into Appellant’s apartment based on a “protective sweep” was illegal because Appellant had **not** been arrested yet and there was **no** evidence that the apartment harbored an individual posing a danger to those at the arrest scene. A protective sweep is **not** an exception to the warrant-requirement that allows the type of entry that Hart made.

Thus, labeling what occurred as an “exigency” was incorrect and turned an illegal entry by Hart into a purportedly legal one based on

misinformation Hart obtained from Cook. Thus, there was **no** exigency that made Hart's warrantless entry into Appellant's apartment legal.

The plain-view doctrine does not apply because the warrantless entry into Appellant's apartment by the officers was unlawful

This subsection is closely intertwined with the one above, but additional discussion of the plain-view doctrine is warranted. During a protective sweep, officers may seize evidence within their plain view. [*Horton v. California*, 496 U.S. 128, 134 \(1990\)](#); [*Coolidge v. New Hampshire*, 403 U.S. 443, 465 \(1971\)](#) (same). The plain-view exception applies if: (1) law enforcement officials have a right to be where they are; and (2) it is immediately apparent that the item seized constitutes evidence, meaning there is probable cause to associate the item with criminal activity. [*Joseph v. State*, 807 S.W.2d 303, 308 \(Tex.Crim.App. 1991\)](#); [*State v. Betts*, 397 S.W.3d 198, 206 \(Tex.Crim.App. 2013\)](#) (same); [*Walter v. State*, 28 S.W.3d 538, 541 \(Tex.Crim.App. 2000\)](#) (same). In determining whether the officer had a right to be where he was, the officer must **not** have violated the Fourth Amendment in arriving at the place from which the evidence could be plainly viewed. *Id.*; [*Horton*, 496 U.S. at 136](#). Under [*Michigan v. Clifford*, 464 U.S. 287, 294 \(1984\)](#), if

evidence of criminal activity is discovered by firefighters during a lawful search under exigent circumstances, firefighters may seize it under the plain view doctrine. [Martin, 576 S.W.3d at 823; id. at *8-9.](#) This is discussed below in detail because unlike in Appellant's case, the "firefighters" in *Clifford* were investigators, which is the equivalent of fire marshals in Texas.

The Court of Appeals found that the "exigency" of the fire gave the firefighters passage into the apartment and continued for a reasonable time after the fire had been extinguished to allow the firefighters to fulfill their duty to ventilate the apartment and ensure the fire was out for good. And while doing so, Cook encountered contraband in plain view. [Martin, 576 S.W.3d at 823-824; id. at *9.](#) The Court of Appeals also found that Cook could have seized the paraphernalia and taken it to the police station or handed it to officers outside the apartment. *Id.* Thus, the Court of Appeals concluded that law enforcement officers may enter premises to seize contraband that was found in plain view by firefighters or other emergency personnel if the exigency is continuing and the emergency personnel are still lawfully present. *Id.*

This finding is **incorrect**. These findings assume that Cook saw illegal activity but Cook admitted that he had **not**. The “drug paraphernalia” Cook saw consisted of empty baggies and pills that Cook could **not** identify—or even tell whether they were Tylenol or Xanax. (RR2.28-29; RR3.SX-11, SX-13). Cook could **not** verify that any substance he saw was illegal. (RR2.29). Cook did **not** see any illegal drugs in the apartment. (RR2.29). Cook admitted that the pills were Ibuprofen for which Appellant had a prescription. (RR2.57). Cook had **no** training with firearms. (RR2.16, 52).

Thus, besides the fact that Cook has **no** roving law enforcement powers—more on this below—contrary to the finding of the Court of Appeals, Cook could **not** have “seized” anything and “taken it to the police station or handed it to officers outside the apartment.”

Unlike fire marshals, because firefighters have “no roving commission to detect crime or to enforce the criminal law” and “do not have general law-enforcement powers,” absent an exigency that allows a peace officer to enter, if a firefighter enters a home to extinguish fires or save lives and notices contraband even in plain view, the firefighter’s knowledge of the contraband does not “impute” to a peace officer,

and the officer should be prohibited from entering the home without a warrant.

In [*Talent v. City of Abilene*, 508 S.W.2d 592, 596 \(Tex. 1974\)](#), the Supreme Court of Texas (“SCOT”) discussed that a “fire chief” is “not a law enforcement official and has no roving commission to detect crime or to enforce the criminal law. He has **no** indictment power. His subordinates (i.e., regular firefighters) may have extraordinary access to the property of others but are **not** employed as law enforcement officers.” The issue in *Talent* dealt with a fire chief having **no** authority to order a polygraph test of a tenured employee about nonemployment related subjects. *Id.*

Here, Cook’s admissions show that he was **no** law enforcement officer. Cook had **no** training with firearms. (RR2.16, 52). Cook called the police due to “safety concerns” due to firearms that were in place and not being handled by anybody and the “drug paraphernalia.” Cook became concerned about his safety and the safety of other firefighters. (RR2.24).

As noted in the PDR, Appellant understands the role of this Court and the SCOT. Appellant does **not** ask this Court to “affirm” *Talent*. However, the SCOT’s findings and observations in *Talent* are persuasive

and highlights the differences between regular firefighters and fire marshals, which are both statutory and grounded on the common law.

First, the differences between regular firefighters and law enforcement officers—including fire marshals—are statutory. Simply put, regular firefighters are **not** peace officers. Under [Tex. Code Crim. Proc. Art. 2.12\(26\), \(32\), & \(35\) \(2018\)](#), peace officers include “(26) officers commissioned by the state fire marshal under Chapter 417, Government Code,” “(32) the fire marshal and any officers, inspectors, or investigators commissioned by an emergency services district under Chapter 775, Health and Safety Code,” and “(35) the fire marshal and any related officers, inspectors, or investigators commissioned by a county under Subchapter B, Chapter 352, Local Government Code.”

Officers “commissioned by the state fire marshal under Chapter 417, Government Code” are fire marshals who have full law-enforcement powers and who **investigate** fires that destroy property or lives. [Tex. Gov. Code § 417.007 \(2019\)](#) & [Tex. Gov. Code § 417.0075 \(2019\)](#). And under Health and Safety Code Chapter 775, district fire marshals that have the same investigative powers may be created if the county does **not** have a county fire marshal. [Tex. Health & Safety Code § 775.101 \(2019\)](#).

These fire marshals: (1) investigate the cause, origin, and circumstances of each fire that damages property; (2) determine whether the fire was caused by negligent or intentional conduct; and (3) enforce all state, county, and district orders and rules that relate to fires, explosions, or damages caused by a fire or an explosion. [Tex. Health & Safety Code § 775.108 \(2019\)](#).

Local Government Code Chapter 352 Subchapter B allows the creation of county fire marshals. These fire marshals investigate fires [[Tex. Local Gov. Code § 352.013 \(2019\)](#)] and investigate suspected arson [[Tex. Local Gov. Code § 352.015 \(2019\)](#)].

Under [Tex. Gov. Code § 417.006 \(2019\)](#) (Fire and Arson Investigators), the state fire marshal may commission peace officers to act as fire and arson investigators under his supervision and to perform other law enforcement duties assigned to the commissioner and the state fire marshal. This statute provides a mechanism to appoint peace officers with the same authority as fire marshals. Thus, a police officer may “step into the shoes” of a fire marshal since both the officer and marshal have roving investigative and law enforcement powers. This statute does **not** authorize a police officer to “step into the shoes” of a regular firefighter.

Nor does it authorize a regular firefighter to “step into the shoes” of an officer or fire marshal.

Under [Tex. Gov. Code § 417.007\(b\) \(2019\)](#) (Investigation of Fire), the state fire marshal at any time may enter a building or premises at which a fire is in progress or has occurred and is under control of law enforcement or fire service officials to investigate the cause, origin, and circumstances of the fire. If control of the building or premises has been relinquished, entry must comply with search-and-seizure law and applicable federal law. This section applies only to fire marshals, who unlike regular firefighter, have roving investigative and police powers.

And under [Tex. Code Crim. Proc. Art. 2.13 \(2019\)](#), Duties and Powers (of peace officers), peace officers shall:

Preserve the peace within the officer’s jurisdiction by all lawful means;

Interfere without warrant to prevent or suppress crime;

Execute all lawful process issued to the officer by any magistrate or court;

Give notice to some magistrate of all offenses committed within the officer's jurisdiction where the officer has good reason to believe there has been a violation of the penal law;

Arrest offenders without warrant in every case where the officer is authorized by law in order that they may be taken before the proper magistrate or court and be tried;

Take possession of a child under [Tex. Code Crim. Proc. Art. 63.009\(g\) \(2019\)](#) (pertaining to missing or exploited children);

While investigating an alleged criminal offense, may inquire as to the nationality or immigration status of a victim of or witness to the offense only if the officer determines that the inquiry is necessary to (1) investigate the offense; or (2) provide the victim or witness with information about federal visas designed to protect individuals providing assistance to law enforcement; and

Execute an emergency detention order issued by the Texas Civil Commitment Office if so requested.

On the other hand, regular firefighters do **not** perform the duties of Texas fire marshals, related officers, or other peace officers. For

instance, the Austin Fire Department lists the duties of its firefighters as:

Respond to various emergency calls including structural and environmental fires, traffic collisions, hazardous material spills, and medical aids;

Connect, lay, and operate water hose lines onto fire;

Operate other fire-extinguishing appliances, perform search-and-rescue procedures, utilize hand-and-power tools, hydraulic tools, portable saws, power-generators, ropes, webbing;

Perform ventilation or entry procedures by opening walls and other structures with hand or power tools;

Raise, lower, and climb ladders to access buildings or rescue persons; make forcible entry into burning buildings;

Provide medical aid to injured persons according to scope of practice that is allowed by local Emergency Medical Services or departmental authority;

Operate emergency medical equipment;

Perform salvage and overhaul procedures to protect property;

Participate in drills, demonstrations, and courses in firefighting techniques, medical aid, heavy rescue, hazardous materials, equipment maintenance and related areas;

Study local conditions and factors affecting fire operations;

Study departmental policy and safety procedures;

Study inspection regulations and prevention rules;

Maintain physical fitness and health;

Inspect business occupancies and perform follow-up procedures to ensure compliance to Fire Codes, National Electric Code, Uniform Building Codes, and state, local, and regional codes;

Participate in local school fire prevention programs by presenting or preparing presentations;

Perform station tours and other public education activities to promote fire safety and public awareness; and

Complete appropriate paperwork.

See Job Duties (of Austin Fire Department firefighters), <https://joinafd.com/job-duties> (last accessed on November 30, 2019).

These job-requirements appear to be uniform state-wide. *See also Recruitment Package* (of Forth Worth Fire Department firefighters),

<http://fortworthtexas.gov/hr/firerecruitment/fire-recruitment.pdf>, (last accessed on November 30, 2019) (Describing continuous training throughout on the latest technologies and newest fire suppression methods, including building construction, emergency medical procedures, hazardous materials, technical rescue, public education, and community relations); and

Becoming a Firefighter (for the City of San Antonio), <https://www.sanantonio.gov/SAFD-Recruiting/BecomingAFirefighter>, (last accessed on November 30, 2019) (Describing how the fire department encounters variety of emergencies, not just fires, including responding to medical emergencies, motor vehicle crashes, aircraft crashes, trench cave-ins, building collapses, hazardous materials incidents, civil disturbances, technical rescues, explosions, tornadoes, earthquakes, and terrorist attacks).

Appellant can list the duties of regular firefighters of many more fire departments in Texas, but no duties in any jurisdiction were found by Appellant to be law-enforcement related. Firefighters in Texas do **not investigate** arsons, deaths, crimes, suspected crimes, or perform any other law-enforcement function that peace officers (including fire

marshals) do, including but not limited to any listed in [Tex. Code Crim. Proc. Art. 2.13 \(2019\)](#), [Tex. Gov. Code § 417.007 \(2019\)](#), [Tex. Gov. Code § 417.0075 \(2019\)](#), [Tex. Health & Safety Code § 775.101 \(2019\)](#), [Tex. Health & Safety Code § 775.108 \(2019\)](#), [Tex. Local Gov. Code § 352.013 \(2019\)](#), [Tex. Local Gov. Code § 352.015 \(2019\)](#), or [Tex. Gov. Code § 417.006 \(2019\)](#).

Appellant's arguments are supported by existing law handed down by the Supreme Court of the United States ("SCOTUS"). As the Court of Appeals observed, under [Clifford, 464 U.S. at 294](#), if evidence of criminal activity is discovered by "firefighters" during a lawful search under exigent circumstances, firefighters may seize it under the plain view doctrine. [Martin, 576 S.W.2d at 823-824; id. at *8-9](#). The Opinion phrased this as though the "firefighters" discussed in *Clifford* are the same as Cook and other firefighters at Appellant's apartment.

However, this is **not** the case. After the home in *Clifford* was damaged by fire, regular firefighters extinguished the blaze then left the premises. *Id.* at 289-290. **Five hours later, arson investigators** arrived at the home to **investigate** the cause of the blaze. *Id.* at 290. The investigators entered the home and conducted an extensive search

without obtaining consent or an administrative warrant. *Id.* Their search and investigation determined that the fire had been caused by an incendiary device made up of a crock-pot with attached wires leading to an electrical timer that was plugged into an outlet and was thus set deliberately. *Id.* The investigators seized the evidence and extended their search to other areas of the home where they found additional evidence of arson. *Id.* There were **no** exigent circumstances justifying a warrantless search. *Id.* at 291, 297-298. And, the SCOTUS refused to exempt from the warrant-requirement administrative investigations into the cause and origin of a fire, holding that the only evidence that is exempt from the warrant-requirement is what was found in the home's *driveway*. *Id.* at 298-299.

Thus, *Clifford* shows what is common sense: firefighters fight fires and save lives, and law enforcement—police officers, arson investigators, and fire marshals—investigate crime. *Clifford* also shows that if **arson investigators** (fire marshals in Texas) are unable to enter a home without a warrant if there are **no** exigent circumstances, if a regular firefighter sees what appears to be contraband and tells a peace officer about it, it does **not** enable the peace officer to enter the home without a

warrant. This is because in Texas, regular firefighters “(have) no roving commission to detect crime or to enforce the criminal law.” And unlike fire marshals, who are peace officers, firefighters do **not** have general law-enforcement powers. Thus, absent an exigency that allows an officer to enter without a warrant, if a firefighter enters a home to extinguish fires or save lives and notices contraband even in plain view, that firefighter’s knowledge does **not** “impute” to a peace officer, and the officer should be prohibited from entering the home without a warrant.

Finally, the Court of Appeals concluded that police officers often fill many roles, including paramedic, social worker, and **fire investigator**. (emphasis supplied): “When those roles overlap the role of criminal investigator, it is not unreasonable to allow officers ‘to step into the shoes of’ the firefighter to observe and to seize the contraband without first obtaining a warrant. Allowing this limited entry by an officer constitutes no greater intrusion upon the defendant’s privacy interest than does a firefighter’s entry.” Thus, Hart’s warrantless entry into the apartment was lawful under the Fourth Amendment. [*Martin*, 576 S.W.3d at 823-826; *id.* at *9-14.](#)

However, there was **no fire-related exigency** that required Hart's warrantless entry into the apartment to conduct a "protective sweep. As Hart testified (RR.49):

Question: Okay. So in terms of exigency, Mr. Martin wasn't doing anything that was getting in the way of any sort of investigation? He wasn't trying to destroy evidence, right?

Hart: Right.

Question: He wasn't running into the apartment trying to hide anything, correct?

Hart: Yes, sir.

Question: So in terms of the investigation that you conducted that night, there was no actual exigency as to the evidence being destroyed, anything along those lines?

Hart: No, sir.

Question: Okay. So you went in there for a protective sweep, right?

Hart: Yes, sir.

Again, there is **no** evidence showing that by entering Appellant's home without a warrant, Hart or other officers were: (1) providing aid or assistance to persons whom law enforcement officers reasonably believe need assistance; (2) protecting officers and others from persons Hart or

other officers reasonably believe to be present, armed, and dangerous; or
(3) preventing the destruction of evidence or contraband.

A firefighter’s lawful entry into a home to put out fires or save lives does not create a “permanent license” for “any sort of public officer [to] thereafter invade (the) home.” However, this effectively is the conclusion of the Court of Appeals, and it is error

The Opinion discussed a “second rationale” that “...simply because a fire official has lawfully entered, this should not create a permanent license for ‘any sort of public officer [to] thereafter invade his home.’”

[*Martin*, 576 S.W.3d at 825; *id.* at *12](#). The Opinion surmised:

“[H]owever, this limitation was not exceeded here. Firefighters were on the scene working when...Hart arrived, and they asked him to secure the apartment. When...Hart’s initial investigation concluded two minutes later, firefighters remained on the scene waiting for his report. Though the fire had subsided, the aftermath of a fire often presents exigencies that will not tolerate the delay necessary to obtain a warrant...The same exigency continued for a reasonable time to allow firefighters to complete their duties, and it was within this window that...Hart conducted his investigation.”

[*Martin*, 576 S.W.3d at 825; *id.* at *12-13](#). This is **not** what occurred. Hart and other officers did **nothing** at the scene that “aided” the firefighters. In fact, the officers and firefighters did **not** speak to each other. The

firefighters continued their work while the officers conducted a search of the apartment (RR.53):

Question: Did you ever tell the fire--fire department, firefighters, the battalion chief, did you -- at any point, did you tell them, I've secured the scene, you're good to go, continue ventilating?

Hart: No, sir, I didn't say that.

Question: During those two minutes, did you secure or clear any of the firearms?

Hart: No, sir, I did not.

Question: At that point, did you seize any of the paraphernalia?

Hart: No, sir.

As the Opinion conceded, simply because a firefighter has lawfully entered a home does not create “a permanent license” for “any sort of public officer [to] thereafter invade” a person’s home. [*Martin*, 576 S.W.3d at 825; id. at *12](#). Cook admitted that they would **not** have let the officers in the apartment until it was “all clear.” (RR.23).

None of the cases cited by the Opinion supports its conclusions. Had Hart entered the apartment because of legitimate exigent circumstances existed and saw contraband, he would **not** have needed a warrant to seize it. For instance, in [*State v. Lewis*, 171 P.3d 731 \(Mont. 2007\)](#), a neighbor

reported smoke coming from Lewis's apartment. *Id.* at 733. Officer McCord was the first to respond to the fire. *Id.* McCord asked the neighbor where the fire was, and she directed him to the back of the structure. *Id.* Through a window, McCord observed flames behind a wood stove in Lewis's apartment and matchbooks with cigarettes in them on a table near the stove. *Id.* McCord entered the apartment to extinguish the fire. *Id.* at 734 Then McCord reentered to take photos of the fuses that he saw on his initial entry before seizing them, which he did on that second entry. Finally, McCord reentered to obtain more evidence. *Id.*

The Montana Supreme Court held that the evidence seized was observed by the officer in plain view and the second entry into the apartment to photograph and seize evidence was justified by exigent circumstances (preventing destruction of evidence). *Id.* at 738-739. But the third entry into the apartment warranted suppression of the evidence that McCord seized during that entry because there were **no** exigent circumstances at that point. *Id.* at 739.

Unlike the situation in Lewis, Hart was **not** the first person to arrive at the apartment or enter it. Hart's warrantless entry into Appellant's apartment was **not** to secure evidence that could be

destroyed by the fire—or otherwise destroyed or hidden. Instead, Hart’s entry into the apartment based to conduct “protective sweep” was based on his **false** assertion that he was looking for “people, bodies” (RR2.36) and he “didn’t know that there was going to be anyone inside” the apartment. (RR2.42). In fact, Appellant had **not** been arrested yet and the apartment clearly was not harboring a person posing a danger to those on the arrest scene. [*Reasor*, 12 S.W.3d at 815-817.](#)

**Cases from other jurisdictions support
Appellant’s arguments**

In addition to [*Lewis*, 171 P.3d 731 \(Mont. 2007\)](#), cases from other jurisdictions support Appellant’s arguments. Beginning with Alaska in [*Schultz v. State*, 593 P.2d 640, 642-643 \(Alas. 1979\)](#), the Supreme Court of Alaska held that fire officials may remain in a building for a reasonable amount of time to investigate the cause of the blaze, but a search conducted without a warrant is unreasonable if done without consent. In Alaska, “fire officials” appear to be the same as Texas fire marshals: “Fire officials are charged not only with extinguishing fires, but with finding their causes. Prompt determination of the fire’s origin may be necessary to prevent its recurrence, as through the detection of continuing dangers such as faulty wiring or a defective furnace.” *Id.* at 643. This is what fire

marshals or investigators do in Texas. They are trained and licensed to act as everyday firefighters to put out fires, but they also have roving investigative powers. On the other hand, everyday Texas firefighters do not stay on the scene for hours to investigate the cause of a fire.

In [*State v. Peters*, 921 N.E.2d 861 \(Ind.App. 2010\)](#), although the Court of Appeals of Indiana did not make an express ruling on the issue that underlies Appellant’s case because of procedural default by the government, the Court observed that once enforcement arrived at the scene of the house fire, they were immediately advised by the fire chief that he suspected a meth lab was inside the home because of the type of precursors and equipment that were found inside. *Id.* at 865. These observations by the firefighters were confirmed by the officer during their inspection of the debris field prior to entering the home. *Id.* There was **no** exigent circumstance upon which a warrantless search could be based.

Id. The Court also observed,

“[I]n fact, if the constitutional right to privacy is ever to survive a residential fire, it must survive the facts of this case. The officers had time for reflective thought, to secure a warrant based upon credible hearsay of the firefighters, and their own observations in the debris field. Whether the oral probable cause for a search warrant was conducted at 3:40 p.m. or at 5:02 p.m. on the afternoon of the fire, one thing is certain—it was merely a phone call away.”

Id. The facts of *Peters* are strikingly like those in Appellant's case in the sense that like in *Peters*, there was **no** real exigency that necessitated the warrantless entry in the apartment by Hart and the officers.

In [*United States v. Hoffman*, 607 F.2d 280 \(9th Cir. 1979\)](#), a firefighter told an officer that the home (a trailer) contained a sawed-off shotgun, which provided probable cause of a violation of federal law. *Id.* at 282. Based on this, the officer made a warrantless entry of the home. *Id.* However, warrantless entries may **not** be made because of probable cause alone. *Id.* at 283, citing [*Katz v. United States*, 389 U.S. 347, 356-357 \(1967\)](#) and [*Agnello v. United States*, 269 U.S. 20, 33 \(1925\)](#). And absent exigent circumstances giving the officer a right to be in the trailer (there were **no** exigent circumstances), the plain-view observation of the shotgun by the firefighter does **not** the officer to make a warrantless entry into the trailer. *Hoffman*, *id.* at 283. And therefore, the plain-view observation of the shotgun by the firefighter was tainted by the officer's unlawful presence and the shotgun is rendered inadmissible as the "fruit" of the illegal entry. *Id.*

The reasoning of the Court was that when the officer entered the trailer to seize the shotgun, "...no immediate emergency existed which

could have served to justify his warrantless entry.” *Id.* Further, “the mere fact that a fire has occurred does not give police officers Carte blanche to enter one’s home, even when armed with probable cause to suspect that evidence of a crime may be within the premises.” *Id.* In *Hoffman* the fire was clearly under control. *Id.* The shotgun was **not** a fire hazard. With the firefighters securing the trailer and the defendant unable to access the trailer, there was no reason to seize the weapon—without a warrant—to protect it from destruction. *Id.*

Hoffman largely tracks what occurred in Appellant’s case. Neither the firearms nor anything else in the apartment were in danger of catching fire or blowing up. Appellant was not in his apartment and was **not** attempting to enter, so there was **no** danger of the destruction of evidence. Even if what the firefighters told Hart and other officers provided them with probable cause that a crime was being committed—it did not since Cook could **not** verify that any substance he saw was illegal, saw only empty baggies, and did **not** see any illegal drugs in the apartment (RR2.29)—probable cause alone did **not** authorized the repeated warrantless entries into the apartment by Hart and the other officers. [*Katz*, 389 U.S. at 356-357](#).

In [*People v. Slaughter*, 803 N.W.2d 171 \(Mich. 2011\)](#), the defendant's neighbor saw water running down her basement wall and over her electrical box and water flowing behind the wall that adjoined the defendant's townhouse. *Id.* at 174-175. The neighbor tried to contact the defendant by herself and through the management company. *Id.* at 175. Firefighters were dispatched. *Id.* The firefighters entered the defendant's residence to shut off the water and to assess whether additional measures needed to be taken to prevent a fire. *Id.* In plain view, the firefighters observed grow-lights and several dozen plants that appeared to be marijuana. *Id.* They reported this to the police, who dispatched an officer to secure the townhouse while another officer applied for a search warrant. *Id.* Armed with the warrant, the officers entered the townhome and seized the incriminating evidence.

Although the primary issues in *Slaughter* revolved around whether it was reasonable for the firefighters to enter rather than find a less-intrusive way to address the apparent emergency—ultimately the Michigan court found that the community caretaking function allowed the firefighters to enter—*Slaughter* is an example of how law enforcement should act when faced with similar situations. There was

no exigent circumstance that justified a warrantless entry by the officers, and the officers in fact did **not** enter without a warrant. Instead, the officers relied on the firefighters for information and using this information, the officers obtained a valid search warrant.

Slaughter underscores what Appellant’s case is about. Based on the information obtained from the firefighters, Hart and the other officers could have easily obtained a warrant before they entered the apartment. There was **no** exigency that justified the warrantless entry. Instead, Hart and the officers made multiple warrantless entries into the apartment. At **no** point did Hart tell BFD that it was “all clear”—that he secured the scene—and that BFD could reenter and continue ventilating. (RR2.53).

Why did Hart **not** do so? The point of his warrantless entry, after all, was to “secure” the scene. The reason why Hart did not do so is because as explained above, there was **no** reasonable belief for the warrantless entry and its premise was **false**. Instead, BFD remained at the scene while Hart and other officers entered and exited the apartment to observe the contraband and firearms to **determine** if they should obtain a search warrant. *Id.* Hart admitted that he should have waited

for a search warrant before continuing the search of the apartment. (RR2.44, 55). The police did **not** obtain a search warrant until over three hours after the initial entry into the apartment by Hart. (RR2.62; RR3.SX-16). There was **no** valid legal reason why the officers failed to obtain the warrant before they entered.

Another case like *Slaughter* where the officers relied on information provided by firefighters to obtain a warrant before entry is [*People v. Dillon*, 44 A.D.3d 1068 \(N.Y.App.Div. 2d Dept. 2007\)](#). In *Dillon*, based on the information received from the firefighters, the police obtained a search warrant, searched the factory, and seized marijuana. *Id.* at 1069. The defendant filed a motion to suppress. The trial court found that the entry and search by the firefighters was proper under the emergency exception to the warrant requirement. *Id.* at 1070. The firefighters then acted properly by providing information about what they saw inside the factor to the police, who then obtained a lawful warrant. *Id.* at 1069.

Finally, another case to consider is [*State v. Huber*, 793 N.W.2d 781 \(N.D. 2011\)](#). Citing [*United States v. Lloyd*, 396 F.3d 948, 955 \(8th Cir. 2005\), cert. denied, 545 U.S. 1110 \(2005\)](#), the *Huber* court noted the action taken by law enforcement in its case to secure a search warrant

after the initial entry ***despite*** the existence of an emergency and exigent circumstances. And as the Eighth Circuit stated in *Lloyd*, “The fact that [the officer] nevertheless went to obtain a search warrant shows the officers’ respect for the Fourth Amendment despite the exigent circumstances they encountered.” *Lloyd*, 396 F.3d at 954. The Huber Court also observed that “[T]he permissibility of the officers’ actions in this case is reinforced by their obtaining a search warrant despite the ongoing emergency, an action which showed similar respect for the protections of the Fourth Amendment.” [*Huber*, 793 N.W.2d at 789](#).

No other exceptions to the warrant-requirement apply

No other exceptions to the warrant-requirement apply that would have allowed Hart to enter Appellant’s home without a warrant. The “independent-source doctrine” to the exclusionary rule under [*Murray v. United States*, 487 U.S. 533, 537-539, 542 \(1987\)](#) does **not** apply because for a “later search” under a warrant to be “genuinely independent” of a prior illegal seizure, the State must show: (1) the police would still have sought a warrant in the absence of the illegal search; **and** (2) that a judge would still have issued the warrant had the supporting affidavit not contained information stemming from the illegal search. The State

showed neither factor here. *See also* [Wehrenberg v. State, 416 S.W.3d 458, 464-466 \(Tex.Crim.App. 2013\)](#) (independent-source doctrine in Texas).

Further, the independent source doctrine is applicable only to situations in which there is **no** causal link between the illegal conduct and the discovery or seizure of evidence. *Id.* at 469. It **cannot** be concluded that there is no causal link between the conduct of Hart and the other officers and the seizure of the evidence from the apartment. The independent-source doctrine applies in situations like in [Wehrenberg](#), where officers had been conducting surveillance of a residence for about 30 days when they received a call from a confidential informant advising them that the occupants were preparing to manufacture meth that night. *Id.* at 461. Several hours later, the officers entered the residence without a search warrant or consent. *Id.* Officers arrested everybody inside and performed a protective sweep. *Id.* They determined that no methamphetamine was being manufactured at that time. *Id.* They exited the residence while investigators prepared the search-warrant affidavit. *Id.* The affidavit relied only on information provided by the confidential informant and did **not** mention the warrantless entry. *Id.* The affidavit

stated that the informant had provided information detailing a meth operation and had within the past 72 hours personally observed the parties in possession of chemicals with intent to manufacture it. *Id.* About 90 minutes after the warrantless entry, the magistrate signed the search warrant and the officers conducted a search of the residence and discovered meth and its implements. *Id.* at 461-462.

The trial court denied the relevant part of the motion to suppress based on the independent-source doctrine and the testimony of an officer who was told by the informant that the suspects were about to manufacture meth. *Id.* at 462. Thus, the officers entered the home to keep evidence from being destroyed. *Id.* The officer explained that it was necessary also to secure the residence because the process of meth-manufacturing is volatile and hazardous, may cause explosions or fires. *Id.*

Critically, the trial court ruled that although the initial entry into the residence was without a lawful warrant, exigent circumstances, or other lawful basis, but that evidence seized under the search warrant was **not** subject to suppression because the affidavit did **not** allude to or mention the warrantless entry of the home or the detention of the

suspects, so the warrant was untainted by the warrantless entry and detention. *Id.*

In Appellant's case, first, unlike the situation in [Wehrenberg](#), there was **no** danger that evidence would be destroyed. Hart admitted that Appellant was **not** doing anything that was impeding the investigation or destroying evidence. (RR2.49).

Second, there is a clear causal link between the warrantless entries by Hart and the other officers and the discovery or seizure of evidence from the apartment. As the second page of the search-warrant affidavit (RR3.SX-16) clearly indicates, the officers **heavily** alluded to and mentioned the warrantless entry of the home:

the laws of the State of Texas, and described as follows:

THE ABOVE DESCRIBED PROPERTY AND METHAMPHETAMINE.

3. Said suspected place and premises are in the charge of and controlled by each of the following person(s):

Martin, Casey Allen W/M 01/17/1991, Arkansas DL # 921864056

4. Affiant has probable cause for said belief, by reasons of the following facts and information:
- A. That your Affiant, Investigator A. Versocki #997, is a peace officer in the State of Texas and is currently employed as a police officer with the City of Bedford, Tarrant County, Texas. Your Affiant has been employed as a police officer for over ten years. Your Affiant is currently assigned to the Criminal Investigation Division (CID) as a narcotics investigator. Your Affiant has attended several classes on narcotic identification and investigations, and has been involved in numerous narcotic investigations involving the possession and trafficking of narcotics.
- B. That on August 30, 2017 at 2359 hours approximately hours your Affiant and Inv. Bridger were contacted by Bedford Police Department Cpl. W. Mack # 873 who advised that patrol officers had been dispatched to 1009 Amherst Dr. #2014, Bedford, Tarrant County, Texas 76021 in reference to a structure fire. Cpl. Mack stated that they had responded to assist Bedford Fire Department on a structure fire after firefighters made entry and located what they believed to be drug paraphernalia along with multiple firearms and ammunition. Officer Hart # 1122 arrived on scene first and made entry and observed plastic deal baggies containing a white crystalized residue along with a glass jar containing a variety of different prescription pills.
- C. That your Affiant arrived on scene and made contact with Cpl. Mack. Cpl. Mack advised that the apartment belonged to Casey Martin and that he was currently sitting outside near the parking lot. I observed a white male wearing no shirt with visible tattoos on his chest sitting on the step in front of the apartment building. I made entry into the apartment and observed fire damage that appeared to be concentrated in the kitchen area. I also observed that the fire suppression system had been activated in the apartment and a large amount of water had flooded the kitchen and living room area. Cpl. Mack advised that Casey stated that he had been cooking chicken nuggets.
- D. That your affiant was led into the southeast bedroom by Cpl. Mack and I observed a clear plastic baggy with a crystal like substance that is consistent in texture to what I know to be crystal methamphetamine sitting on a dresser in plain view. Also on the dresser in plain view, I observed a clear glass jar containing what appeared to be several different prescription medications. I observed a large glass smoking pipe containing burnt Tetrahydrocannabinol/ marijuana residue located on a shelf in the closet that had the door standing open. In plain view on a night stand in a plastic bin I observed a broken bulbous pipe with brown residue inside. The pipe is consistent with the type of pipe used to smoke methamphetamine and the brown residue is consistent with burnt methamphetamine residue.
- E. That Cpl. Mack and Officer T. Noble #968 asked Casey Martin for consent to search his apartment which he denied.
- F. That Inv. Bridger # 1032 spoke to Bedford Firefighter D. Cook #117 by phone. Firefighter Cook advised that as he pulled into the complex on the firetruck he observed a white

The highlighted parts of the second page of the affidavit discuss how Hart “arrived on scene first and made entry and observed plastic deal baggies containing a white crystallized residue along with a glass jar containing a variety of different prescription pills”;

That the Affiant (Officer Versocki) arrived on scene where Corporal Mack told Versocki that the apartment belongs to Appellant, who was sitting outside near the parking lot;

Versocki entered the apartment—obviously without a warrant—and observed fire damage in the kitchen, was led to the bedroom by Mack where Versocki “observed a clear plastic baggy with a crystal like substance that is consistent in texture to what (Versocki) know(s) to be crystal methamphetamine sitting on a dresser in plain view;

On the dresser Versocki observed a clear glass jar containing what appeared to be several different prescription medications;

Versocki observed a large glass smoking pipe containing burnt marijuana residue located on a shelf in the closet that had the door standing open

Versocki also observed in plain view on a nightstand in a plastic bin a broken pipe with brown residue inside, which is “consistent with the

type of pipe used to smoke methamphetamine and the brown residue is consistent with burnt methamphetamine residue; and

Mack and Officer Noble asked Appellant for Casey Martin for consent to search the apartment, which was denied.

Thus, the independent source doctrine is **inapplicable** here because there is a heavy causal link between the illegal warrantless entry and the discovery or seizure of evidence. [*Wehrenberg*](#), 416 S.W.3d at 469.

Nor does the “inevitable-discovery doctrine” to the exclusionary rule apply because the government must show by a preponderance of the evidence that: (1) there is a reasonable probability that the contested evidence would have been discovered by lawful means in the absence of police misconduct; and (2) the State was actively pursuing a substantial alternate line of investigation at the time of the constitutional violation. *See, e.g., United States v. Zavala*, 541 F.3d 562, 578 (5th Cir. 2008). Importantly, the inevitable-discovery doctrine does **not** comport with [Tex. Code Crim. Proc. Art. 38.23\(a\) \(2019\)](#) because the doctrine assumes that the evidence has been obtained illegally. [*McClintock v. State*](#), 541 S.W.3d 63, 69 (Tex.Crim.App. 2017). Thus, the inevitable-discovery doctrine does **not** apply in Texas.

The statutory good-faith exception under Art. 38.23(b) does not apply

Under [Tex. Code Crim. Proc. Art. 38.23\(b\) \(2019\)](#), it is an exception to Art. 38.23(a) (the Texas exclusionary rule) that the evidence was obtained by an officer acting in objective good faith reliance upon a warrant issued by a neutral magistrate based on probable cause. The good-faith exception under Art. 38.23(b) does **not** apply here. There was **no** good-faith reliance on a warrant because **no** officer attempted to obtain a warrant prior to the illegal entry of Appellant's apartment.

The police action here defied logic and the law because Hart believed that he and other officers were authorized to reenter the apartment after the initial warrantless entry because he had “already observed all of the drug paraphernalia that was in plain view,” so he believed “that gives us basically the authority to freeze” the apartment if they wanted to. (RR2.42-43). Yet Hart admitted that when a scene is “frozen,” law enforcement is supposed to not allow persons enter the scene until they obtained “lawful authority” to proceed with the investigation. (RR2.58). “Lawful authority means obtaining a warrant, not reentering the location after an initial warrantless entry when there were no exigent circumstances.

The nonstatutory good-faith exception under *Leon* does not apply

The nonstatutory good-faith exception under [*United States v. Leon*, 468 U.S. 897 \(1984\)](#) also does **not** apply. First, the burden of proof on the good-faith exception is on the State, and the State cannot **meet** that burden. Second, like the statutory good-faith exception of [*Tex. Code Crim. Proc. Art. 38.23\(b\) \(2019\)*](#), the nonstatutory good-faith exception relies on a search executed in objectively reasonable reliance on a warrant, a database, a statute, or binding judicial precedent. Here there was **no** valid warrant, database, statute, or binding judicial precedent.

First, the burden of proof on the good-faith exception is on the State, and the State is unable to meet that burden. The issue of the burden of proof on the good-faith exception was recently discussed by the Second Court of Appeals in [*Wheeler v. State*, 573 S.W.3d 437, 442 \(Tex.App.-Fort Worth 2019\)](#). As the Second Court of Appeals concluded, the burden is on the State to show the applicability of the good-faith exception and to justify admission of the blood-alcohol results:

“...[b]ecause the good-faith exception is just that—an exception—the State had the burden to show its applicability to justify admission of the blood-alcohol results in response to Wheeler’s motion to suppress.”

Id. at 442; *citing George E. Dix & John M. Schmolesky*, Texas Practice:

Criminal Practice & Procedure § 18:28 (3d ed. 2011) and [Tex. Penal Code § 2.02\(b\) \(2019\)](#), which places the burden of proof on the State to negate any labeled exception to commission of an offense. As the arguments below will show, the State failed to meet its burden of proof.

The good-faith exception relies on a search executed in objectively reasonable reliance on a warrant, a database, a statute, or binding judicial precedent, and here there was **no** valid warrant, database, statute, or binding judicial precedent. In [United States v. Leon, 468 U.S. 897 \(1984\)](#), the SCOTUS held that evidence obtained by officers acting in reasonable reliance on a search warrant ultimately found to be unsupported by probable cause is still admissible since the “substantial social costs exacted by the exclusionary rule” outweighs the potential to deter police misconduct. *Id.* at 900, 907-909. This balancing test weighs against suppression when officers act with an “objectively reasonable belief that their conduct did not violate the Fourth Amendment.” *Id.* at 918-919. Thus, the “marginal or nonexistent benefits produced by suppressing evidence” do not justify the “substantial costs of exclusion.” *Id.* at 922.

Then in [Illinois v. Krull, 480 U.S. 340, 349-350 \(1987\)](#), the good-

faith exception was extended to searches conducted in reasonable reliance on subsequently invalidated statutes. *Krull* does **not** apply here. Still later in [*Arizona v. Evans*, 514 U.S. 1, 14 \(1995\)](#), the good-faith exception was applied where police reasonably relied on erroneous information concerning an arrest warrant in a database maintained by judicial employees. There was **no** database relied upon here.

More recently in [*Davis v. United States*, 564 U.S. 229 \(2011\)](#), the defendant was arrested during a routine traffic-stop and placed in the back of a patrol car. *Id.* at 234. Officers searched the passenger compartment and found a firearm inside a pocket of a jacket. *Id.* The defendant was indicted for felon in possession of a firearm. *Id.*

While *Davis* was on direct appeal, [*Arizona v. Gant*, 556 U.S. 332 \(2009\)](#) was decided. *Gant* held that police “may search a vehicle incident to a recent occupant’s arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest.” *Gant*, 556 U.S. at 351. The SCOTUS held in *Davis* that the search of the vehicle incident to the arrest violated the Fourth Amendment but the court refused to suppress the evidence, holding that

“searches conducted in objectively reasonable reliance on binding appellate precedent are not subject to the exclusionary rule.” *Davis, id.* at 232-234. As discussed above, in *Davis* the SCOTUS restated the long-standing rule that the purpose of the exclusionary rule is **not** to redress individual injury but to deter future violations of the Fourth Amendment. *Id.* at 235-236. Still, the requirement that police have acted in “reasonable reliance” remains a requirement. Thus, “[w]hen police exhibit deliberate, reckless, or grossly negligent disregard for Fourth Amendment rights, the deterrent value of exclusion is strong and tends to outweigh the resulting costs. *Id.* at 238.

Here, the law enforcement did **not** conduct the initial warrantless entries and searches in objectively reasonable reliance on a warrant, binding judicial precedent, or a database. There was **no** warrant. **Nor** was there a database, statute, or binding judicial precedent.

The final part of the good-faith exception analysis is whether there was binding judicial precedent. There was no binding judicial precedent as there was **no** valid exception to the exclusionary rule that the police relied upon. *See also* [*Herring v. United States*, 555 U.S. 135, 140 \(2009\)](#) (the exclusionary rule is not automatic when there is a violation

of the Fourth Amendment but reasonableness of the actions of law enforcement must be considered).

The good-faith exception relies on a search executed in objectively reasonable reliance on a warrant, a database, or binding judicial precedent, and here there was **no** warrant, database, or binding judicial precedent. Because the State **cannot** rely in the good-faith exception and the burden of proof is on the State to show good faith, the State failed to meet its burden of proof. Thus, this Court should disregard the good-faith exception.

All evidence seized from Appellant's home must be suppressed under the fruit-of-the-poisonous-tree doctrine

Based on the arguments above, all evidence seized from Appellant's home due to the warrantless illegal entry by Hart and the second warrantless illegal entry by Hart and the other officers must be suppressed under the fruit-of-the-poisonous-tree doctrine, which bars the State from using both the indirect product and the direct product of unconstitutional conduct. [*Wong Sun v. United States*, 371 U.S. 471, 487-488 \(1963\)](#) and [*Segura v. United States*, 468 U.S. 796, 804 \(1984\)](#) (same).

XI. Conclusion and Prayer

The trial court erred and abused its discretion by denying Appellant's motion to suppress. And, the Court of Appeals erred by affirming the Judgment, which placed Appellant on deferred adjudication community supervision, and erred by accepting the FFCL. Further, the Court of Appeals: (1) decided an important question of state and federal law that has not been but should be settled by this Court; and (2) decided an important question of state or federal law in a way that conflicts with the applicable decisions of this Court and the Supreme Court. *See* [Tex. Rule App. Proc. 66.3\(b\) & \(c\) \(2019\)](#). Appellant prays that the Court reverse the Opinion and the Judgment, suppress all the evidence seized from Appellant's apartment, and remand for a new trial.

Respectfully submitted,

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XII. Certificate of Service

I certify that on December 2, 2019, a copy of this document was served on the Tarrant County District Attorney's Office, Appellate Division, by efile to COAappellatealerts@TarrantCountytx.gov; and on the State Prosecuting Attorney by efile to stacey.soule@spa.texas.gov, john.messinger@spa.state.tx.us, and information@spa.texas.gov. *See* Tex. Rule App. Proc. 9.5 (2019) and Tex. Rule App. Proc. 68.11 (2019).



/s/ Michael Mowla
Michael Mowla

XIII. Certificate of Compliance with Tex. Rule App. Proc. 9.4

I certify that this document complies with: (1) the type-volume limitations because it is computer-generated and does **not** exceed 15,000 words. Using the word-count feature of Microsoft Word 2018, this document contains **12,592** words **except** in the following sections: caption; identity of parties, counsel, and judges; table of contents; table of authorities; statement regarding oral argument; statement of the case, procedural history, and statement of jurisdiction; statement of issues presented (grounds for review section); signature; certificate of service; certificate of compliance; and the appendix; and (2) the typeface requirements because it has been prepared in a proportionally spaced typeface using Microsoft Word 2018 in 14-point font. *See* [Tex. Rule App. Proc. 9.4 \(2019\)](#).



/s/ Michael Mowla
Michael Mowla

Appendix



**In the
Court of Appeals
Second Appellate District of Texas
at Fort Worth**

No. 02-18-00333-CR

CASEY ALLEN MARTIN, Appellant

V.

THE STATE OF TEXAS

On Appeal from Criminal District Court No. 1
Tarrant County, Texas
Trial Court No. 1515753D

Before Kerr, Birdwell, and Bassel, JJ.
Opinion by Justice Birdwell

OPINION

A fire broke out in appellant Casey Allen Martin's apartment, and firefighters entered to battle the blaze. Firefighters saw drug paraphernalia inside, and they called police in to observe the scene. Officers then obtained a search warrant, which led to the discovery of the methamphetamine that was the basis for Martin's conviction.

In one issue, Martin appeals the denial of his motion to suppress. Martin does not dispute that the fire permitted firefighters to enter the apartment. But he contends that the same exigent circumstances did not also authorize officers to enter and observe, in plain view, the same contraband that firefighters had already seen. Because we disagree, we affirm.

I. Background

On August 30, 2017, at approximately 10:47 p.m., the Bedford Fire Department ("BFD") was called to a fire at an apartment complex.¹ Firefighter Darren Cook located the source of the fire as an apartment on the second floor, with smoke and water flowing from the door. Cook contacted the tenant, Martin, who indicated that he fell asleep while cooking on the stove.

BFD made entry and extinguished a small fire on the cooktop. Cook then began efforts to ventilate the apartment. Cook attempted to open a window in the

¹We draw our recitation of the facts from the trial court's findings, which are reasonably supported by the record. *See State v. Kernick*, 393 S.W.3d 270, 274 (Tex. Crim. App. 2013).

back bedroom, kneeling on a futon to reach the window, and his knee touched a firearm. Cook became concerned about his safety and the safety of the other firefighters. The firefighters began to look around the apartment and observed other firearms and ammunition scattered throughout the apartment, giving Cook additional safety concerns. Cook also saw multiple items of drug paraphernalia sitting on dressers, tables, and a shelf in an open closet—all in plain view. Cook decided to call the police due to his safety concerns and the drug paraphernalia.

Officer Hunter Hart of the Bedford Police Department was dispatched to the scene. When Officer Hart arrived, he made contact with the BFD battalion chief. The chief told Officer Hart that BFD could not ventilate the back bedroom of the apartment because there were blankets over the windows and that BFD had located guns and drug paraphernalia inside the apartment. The chief told Officer Hart that he was concerned about the safety of BFD due to what they had observed, and he wanted Officer Hart to secure the apartment.

Officer Hart went into the apartment and inspected each room, ending with the back bedroom. In the bedroom, he observed drug paraphernalia in plain view. Officer Hart described the paraphernalia as a pipe or bong containing drug residue, a plastic baggie containing drug residue, and additional plastic baggies commonly used to contain narcotics. Based on the items of drug paraphernalia, Officer Hart believed that an offense had been committed, and he “froze” the apartment as a crime scene. Officer Hart exited the apartment approximately two minutes after his initial entry

and determined that there was no one inside who could pose a safety risk. BFD remained at the scene while Officer Hart entered and exited the apartment.

Additional officers went into the apartment to observe the contraband and to determine if they should obtain a search warrant for the apartment. The police did not seize any evidence at that time. The officers talked to Martin, who stated that he was the only one residing in the apartment. Martin was arrested for possession of drug paraphernalia.

Officer Hart then left the scene, and Bedford police obtained a search warrant at 3:12 a.m. on August 31, 2017. In the warrant affidavit, an officer alleged that Cook and BFD had located what they believed to be drug paraphernalia inside the residence. Police executed the search warrant and found the methamphetamine that is the subject of this case.

After hearing the evidence, the trial court denied suppression and entered findings of fact and conclusions of law. In its conclusions, the trial court stated that the firefighters' entry into the apartment was lawfully related to exigent circumstances: combatting an ongoing fire. The trial court observed that under Supreme Court precedent, the firefighters would have been within their rights to seize the drug paraphernalia that they saw in plain view.

The trial court also concluded that Officer Hart's entry was justified, though it noted that the Texas Court of Criminal Appeals had yet to address this issue. The trial court reasoned that firefighters should be permitted to call on officers to secure

the scene of a fire and to observe, in plain view, the same evidence that firefighters were entitled to seize. As support, the trial court cited cases from several other jurisdictions, and it noted that “the overwhelming majority of courts that have addressed this issue have concluded that the police may step into the shoes of the firefighter to seize the contraband without first obtaining a warrant.” The trial court concluded that because both Cook’s and Officer Hart’s entries into the apartment were lawful under the Fourth Amendment, suppression should be denied.

Following denial of suppression, Martin pleaded guilty to possession of methamphetamine. The trial court deferred adjudication and placed Martin on community supervision for a period of seven years. Martin appeals the trial court’s ruling, which we now consider. *See* Tex. R. App. P. 25.2(a)(2)(A).

II. Discussion

Martin contends that the trial court erred by denying his motion to suppress.² Martin does not dispute that exigent circumstances permitted the firefighters’ entry into the apartment and their efforts to control the fire. But he asserts that the same circumstances did not validate Officer Hart’s entry, especially because the fire was doused before he arrived. Martin submits that despite the testimony regarding firearms, contraband, and the firefighters’ safety concerns, there was no realistic

²To begin with, Martin offers three propositions that the State does not contest: (1) that even after the fire, he maintained a reasonable expectation of privacy in the apartment; (2) that the protective sweep doctrine does not apply; and (3) that he never provided consent to search his apartment. Because these arguments are not dispositive or contested, we do not address them further.

indication that some other form of exigency was afoot, such as an armed confrontation. Martin contends that because any remaining exigency was extinguished with the last flames, the officer's entry was unlawful. And because the entry was unlawful, Martin reasons, the methamphetamine must be suppressed as the fruit of an illegal search.

In response, the State asks us to adopt the rule applied by courts in many other jurisdictions: where a lawful intrusion by a firefighter has already occurred, and the firefighter has already observed contraband in plain view, the invasion of privacy is not increased by allowing an officer to enter the residence and observe or seize the contraband. We will oblige the State's request.

We review a trial court's ruling on a motion to suppress evidence under a bifurcated standard of review. *Lerma v. State*, 543 S.W.3d 184, 189–90 (Tex. Crim. App. 2018). At a motion to suppress hearing, the trial judge is the sole trier of fact and judge of credibility of witnesses and the weight to be given to their testimony. *Id.* at 190. Therefore, we afford almost complete deference to the trial court in determining historical facts. *Id.* When a trial judge makes express findings of fact, an appellate court must examine the record in the light most favorable to the ruling and uphold those fact findings so long as they are supported by the record. *State v. Rodriguez*, 521 S.W.3d 1, 8 (Tex. Crim. App. 2017). The appellate court then proceeds to a de novo determination of the legal significance of the facts as found by the trial

court—including the determination of whether a specific search or seizure was reasonable. *Id.*

The Fourth Amendment provides that “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause.” U.S. Const. amend. IV. In *Michigan v. Tyler*, the United States Supreme Court concluded that the protection against unreasonable search and seizure applies to fire officials. 436 U.S. 499, 509–10, 98 S. Ct. 1942, 1950 (1978).

The ultimate touchstone of the Fourth Amendment is “reasonableness.” *Fernandez v. California*, 571 U.S. 292, 298, 134 S. Ct. 1126, 1132 (2014). A warrantless police entry into a person’s home is presumptively unreasonable unless it falls within the scope of one of a few well-delineated exceptions to the warrant requirement. *Turrubiate v. State*, 399 S.W.3d 147, 151 (Tex. Crim. App. 2013); *Johnson v. State*, 226 S.W.3d 439, 443 (Tex. Crim. App. 2007). This general rule applies equally to fire-damaged property “unless the fire is so devastating that no reasonable privacy interests remain in the ash and ruins.” *Garrison v. State*, Nos. 2-04-450-CR, 2-04-451-CR, 2005 WL 1594258, at *2 (Tex. App.—Fort Worth July 7, 2005, pets. ref’d) (not designated for publication).

One well-recognized exception applies when the exigencies of the situation make the needs of law enforcement so compelling that a warrantless search is objectively reasonable under the Fourth Amendment. *Missouri v. McNeely*, 569 U.S.

141, 148–49, 133 S. Ct. 1552, 1558 (2013); *see Payton v. New York*, 445 U.S. 573, 590, 100 S. Ct. 1371, 1382 (1980) (“[T]he Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant.”). “A variety of circumstances may give rise to an exigency sufficient to justify a warrantless search, including law enforcement’s need to provide emergency assistance to an occupant of a home . . . or enter a burning building to put out a fire and investigate its cause.” *McNeehy*, 569 U.S. at 149, 133 S. Ct. at 1558–59. Moreover, the exigent circumstances created by a fire are not extinguished the moment the fire is put out. *See Tyler*, 436 U.S. at 510, 98 S. Ct. at 1950; *Johnson*, 226 S.W.3d at 446 n.29. Rather, “the exigent circumstances warranting intrusion by government officials continue for a reasonable time after the fire has been extinguished to allow fire officials to fulfill their duties, including making sure the fire will not rekindle, and investigating the cause of the fire.” *Jones v. Commonwealth*, 512 S.E.2d 165, 168 (Va. Ct. App. 1999) (citing *Tyler*, 436 U.S. at 510, 98 S. Ct. at 1950). The determination of what constitutes a reasonable time to investigate varies according to the circumstances of a particular fire. *Tata v. State*, 446 S.W.3d 456, 467 (Tex. App.—Houston [1st Dist.] 2014, pet. ref’d) (citing *Tyler*, 436 U.S. at 510 n.6, 98 S. Ct. at 1950 n.6).

If evidence of criminal activity is discovered by firefighters during the course of a lawful search under exigent circumstances, firefighters may seize it under the plain view doctrine. *Michigan v. Clifford*, 464 U.S. 287, 294, 104 S. Ct. 641, 647 (1984).

Three requirements must be met to justify the seizure of an object in plain view: (1) law enforcement officials must lawfully be where the object can be “plainly viewed”; (2) the “incriminating character” of the object in plain view must be “immediately apparent” to the officials; and (3) the officials must have the right to access the object. *State v. Betts*, 397 S.W.3d 198, 206 (Tex. Crim. App. 2013).

Here, it is undoubted that the firefighters’ entry into and conduct within the apartment was permissible under the Fourth Amendment. The exigency of the fire gave the firefighters passage into Martin’s apartment. That exigency continued for a reasonable time after the fire had been extinguished to allow Cook and other firefighters to fulfill their duty to ventilate the apartment and to ensure the fire was out for good. *See Tyler*, 436 U.S. at 510, 98 S. Ct. at 1950. While ventilating the apartment, Cook encountered contraband in plain view. Therefore, Cook certainly could have seized the paraphernalia and taken it to the police station, or simply handed it to officers outside the apartment. *See Clifford*, 464 U.S. at 294, 104 S. Ct. at 647.

The question remains whether the officers’ entry also passes constitutional muster. “Of those jurisdictions that have considered the question, a majority has held that law enforcement officers may enter premises to seize contraband that was found in plain view by firefighters or other emergency personnel, at least if the exigency is continuing and the emergency personnel are still lawfully present.” *State v. Bower*, 21 P.3d 491, 496 (Idaho Ct. App. 2001), *abrogated in part on other grounds by State v. Islas*,

No. 45174, 2019 WL 1053379, at *6 (Idaho Ct. App. Mar. 6, 2019); *see Steigler v. Anderson*, 496 F.2d 793, 797–98 (3d Cir. 1974); *United States v. Green*, 474 F.2d 1385, 1390 (5th Cir. 1973); *Mazen v. Seidel*, 940 P.2d 923, 927–28 (Ariz. 1997); *People v. Harper*, 902 P.2d 842, 846 (Colo. 1995); *State v. Eady*, 733 A.2d 112, 123 (Conn. 1999) (op. on reh’g); *Hazelwood v. Commonwealth*, 8 S.W.3d 886, 887 (Ky. Ct. App. 1999); *Commonwealth v. Person*, 560 A.2d 761, 765 (Pa. Super. Ct. 1989); *Jones*, 512 S.E.2d at 168–69; *State v. Bell*, 737 P.2d 254, 259 (Wash. 1987), *abrogated in part on other grounds by Horton v. California*, 496 U.S. 128, 110 S. Ct. 2301 (1990).

In our view, such a rule is well founded. “Police officers often fill many roles, including paramedic, social worker, and fire investigator.” *Mazen*, 940 P.2d at 928. When those roles overlap the role of criminal investigator, it is not unreasonable to allow officers “to step into the shoes of” the firefighter to observe and to seize the contraband without first obtaining a warrant. *Id.* Allowing this limited entry by an officer constitutes no greater intrusion upon the defendant’s privacy interest than does a firefighter’s entry. *Green*, 474 F.2d at 1390; *Eady*, 733 A.2d at 120; *Bower*, 21 P.3d at 496; *Jones*, 512 S.E.2d at 168. Under such circumstances, it would impose needless inconvenience and danger—to the firefighter, the officer, and the evidence—to require suspension of activity while a warrant is obtained. *Eady*, 733 A.2d at 120. Firefighters’ efforts are best devoted to fighting fire and sorting the aftermath, which are within their mission and core expertise. When, as here, the presence of firearms

and contraband distracts from that mission, firefighters should be permitted to call upon police, whose expertise includes handling firearms and securing contraband.³

We note that a contrary rule is stated by two courts: *United States v. Hoffman*, 607 F.2d 280, 283–85 (9th Cir. 1979), and *State v. Bassett*, 982 P.2d 410, 419 (Mont. 1999). These courts held that firefighters may not call police into the scene of a fire to witness or seize contraband without first observing the warrant requirement.

As support, these courts offered two rationales. First, these courts rejected the notion that a police officer may legitimately “step into the shoes” of a firefighter because the firefighter and the police officer entered burned houses for two entirely separate reasons. *See, e.g., Bassett*, 982 P.2d at 418. The firefighters entered the home to extinguish the fire, to clean up, and to ensure that the fire did not reignite. *Id.* But the police officer entered solely to seize criminal evidence unrelated to the fire. *Id.* The *Bassett* court held that because there were “two separate reasons for entering the house, . . . there thus must be two entirely separate justifications for each entry.” *Id.*; *see Hoffman*, 607 F.2d at 284–85 (concluding that an officer’s entry was not a “mere extension” of the firefighter’s entry in part because the officer’s “only purpose in entering appellant’s trailer . . . was to seize evidence of an unrelated federal crime”).

We disagree with this line of reasoning. It is well established that an officer’s subjective reasons for acting are irrelevant in determining whether that officer’s

³This cause presents an even stronger case for the application of the majority rule, for in addition to contraband, firefighters faced safety concerns from the presence of several firearms.

actions violate the Fourth Amendment. *Brigham City, Utah v. Stuart*, 547 U.S. 398, 404, 126 S. Ct. 1943, 1948 (2006). “[T]he issue is not his state of mind, but the objective effect of his actions” *Id.* at 398, 126 S. Ct. at 1948 (quoting *Bond v. United States*, 529 U.S. 334, 338 n.2, 120 S. Ct. 1462, 1465 n.2 (2000)). Because this rationale would instead make an officer’s subjective motivation a paramount concern, we must respectfully part ways with our brethren in Montana and the Ninth Circuit.

As a second rationale, these courts have emphasized that simply because a fire official has lawfully entered, this should not create a permanent license for “any sort of public officer [to] thereafter invade his home.” *Hoffman*, 607 F.2d at 285; *see Bassett*, 982 P.2d at 417. We agree with this logic, which under the majority rule has been fashioned into a limitation forbidding subsequent searches after police and fire officials have left the scene. *See Clifford*, 464 U.S. at 293, 104 S. Ct. at 647; *Mazen*, 940 P.2d at 928; *Bower*, 21 P.3d at 497; *cf. Bray v. State*, 597 S.W.2d 763, 768 (Tex. Crim. App. [Panel Op.] 1980) (holding that warrantless search of apartment’s bathroom conducted by police officer, who entered premises after fire department personnel informed officer that there was no immediate danger and left the scene, was not justified by emergency doctrine).

However, this limitation was not exceeded here. Firefighters were on the scene working when Officer Hart arrived, and they asked him to secure the apartment. When Officer Hart’s initial investigation concluded two minutes later, firefighters remained on the scene waiting for his report. Though the fire had subsided, the

aftermath of a fire often presents exigencies that will not tolerate the delay necessary to obtain a warrant. *Clifford*, 464 U.S. at 293, 104 S. Ct. at 647. The same exigency continued for a reasonable time to allow firefighters to complete their duties, and it was within this window that Officer Hart conducted his investigation. *See Tyler*, 436 U.S. at 510, 98 S. Ct. at 1950.

Nor did Officer Hart violate another limitation: multiple courts have held that when an officer steps into a firefighter's shoes, the officer must not exceed the boundaries of the original entry or undertake a general search of the premises. *See Mazen*, 940 P.2d at 929; *Eady*, 733 A.2d at 120; *Bower*, 21 P.3d at 497; *Jones*, 512 S.E.2d at 169; *Bell*, 737 P.2d at 259. During Officer Hart's initial entry, he surveyed the main areas of the apartment and opened a hallway door. He then proceeded to the back bedroom to observe the paraphernalia in plain view, just as the firefighters had done, and he exited the apartment just as quickly as he entered. Thus, he remained within the bounds of the firefighters' original entry.

Because the officer's intrusion did not exceed that of the emergency personnel who were still on the scene, Martin suffered no additional injury to his privacy interest due to the officer's entry. *See Bower*, 21 P.3d at 497. Therefore, Officer Hart "cannot be constitutionally tripped up at the threshold"; he must be allowed to step into Cook's shoes and make the same plain-view observation that Cook was entitled to make. *See Eady*, 733 A.2d at 122 n.16 (quoting *Green*, 474 F.2d at 1390). We conclude

that Officer Hart's entry into the apartment was lawful under the Fourth Amendment.

We therefore overrule Martin's first and only issue.

III. Conclusion

We affirm the judgment of the trial court.

/s/ Wade Birdwell

Wade Birdwell
Justice

Publish

Delivered: May 16, 2019



**In the
Court of Appeals
Second Appellate District of Texas
at Fort Worth**

No. 02-18-00333-CR

CASEY ALLEN MARTIN, Appellant	§	On Appeal from Criminal District Court No. 1
	§	of Tarrant County (1515753D)
v.	§	May 16, 2019
	§	Opinion by Justice Birdwell
THE STATE OF TEXAS	§	(p)

JUDGMENT

This court has considered the record on appeal in this case and holds that there was no error in the trial court's judgment. It is ordered that the judgment of the trial court is affirmed.

SECOND DISTRICT COURT OF APPEALS

By /s/ Wade Birdwell
Justice Wade Birdwell